AZMAN & TAY ASSOCIATES SDN BHD

v.

SENTUL RAYA SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
VINCENT NG J
[COMPANIES WINDING UP NO: D1-28-567-2001]
1 JULY 2002

COMPANY LAW: *Winding-up - Advertisement of petition - Injunction to restrain advertisement of petition - Whether court empowered to grant injunction - Companies (Winding-Up) Rules 1972, r. 24*

This was an application by the respondent for an injunction restraining the petitioner from advertising or otherwise publishing the existence or contents of a winding-up petition which had already been filed.

Held:

[1] Rule 24 of the Companies (Winding-Up) Rules 1972 imposed upon the petitioner a mandatory rather than directory requirement to advertise and gazette the winding-up petition upon it being filed, which debarred this court from granting the injunction sought by the respondent. (p 400 a)

[Application dismissed.]

Case(s) referred to:

CGU Insurance Bhd v. Asean Security Paper Mills Sdn Bhd [2001] 1 CLJ 305 ***(refd)***

CGU Insurance Bhd v. Asean Security Paper Mills Sdn Bhd & Other Appeals [2002] 2 CLJ 1 ***(refd)***

Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd [1988] 2 CLJ 424; [1988] 1 CLJ (Rep) 5 ***(refd)***

Commissioner of State Revenue of Victoria v. The Roy Morgan Research Centre Pty Ltd 24 ACSR 73 30 ***(refd)***

Crocuses & Daffodils (M) Sdn Bhd v. Development & Commercial Bank Bhd [1997] 3 CLJ 485 ***(refd)***

Foursea Construction (M) Sdn Bhd [1998] 3 CLJ 135 ***(refd)***

In The Matter of the Corporations Law of Victoria and In The Matter of Brick Link Pty Ltd 4254 of 1991 - 1991 Vic Lexis 505, BC 9100684 ***(refd)***

Lim Hean Pin v. Thean Seng Co Sdn Bhd & Ors [1991] 2 MLJ 564 ***(refd)***

Land Executive Committee of Federal Territory v. Syarikat Harper Gilfillan Bhd [1981] 1 MLJ 234 ***(refd)***

NKM Holdings Sdn Bhd v. Pan Malaysia Wood Bhd [1987] 1 MLJ 39 ***(refd)***

Pickwick International [1972] 3 All ER 384 ***(refd)***

Re a Company (No 0013925 of 1991) [1992] BCLC 562 ***(refd)***
Re a Company (No 007923 of 1994) Re a Company (No 007924 of 1994) [1995] 1 BCLC 440 ***(refd)***
Re a Company (No 008725 of 1991 and No 008727 of 1991) [1991] BCLC 633 ***(refd)***
Re DR Electrical and Engineering Pty Ltd 15 ACLR 700 ***(refd)***
Re Five Oaks Construction Ltd [1968] 112 SJ 86 ***(refd)***
Re NKM Holdings Sdn Bhd [1985] 2 MLJ 390 ***(refd)***
Re Signland Ltd [1982] 2 All ER 610 ***(refd)***
Shell Malaysia Trading Sdn Bhd v. Pemungut Duti Setem Pulau Pinang [1998] 1 CLJ Supp 126 ***(refd)***
Shing Hup Hin Construction Sdn Bhd v. General Soil Engineering Sdn Bhd [1999] 1 CLJ 303 ***(refd)***
Solid Kitchen Sdn Bhd v. Regal Development Sdn Bhd [1998] 3 CLJ Supp 409 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 218, 221(2)(b), 222, 226(2), (3), 243
Companies (Winding Up) Rules 1972, r. 24

Companies (Winding-Up) Rules 1949 [UK], r. 28
Insolvency Rules 1986 [UK], r. 4.11(1)
Rules of the Supreme Court [Vic], r. 8.10
Rules of the Supreme Court [NSW], r. 18(4)

For the petitioner - Richard Tee (Grace Chin); M/s Richard Tee & Co
For the respondent - Michael Chow; M/s Logan Sabapathy & Co

Other source(s) referred to:
Snell's Equity, 13th edn, p 29

Reported by Suresh Nathan

JUDGMENT

Vincent Ng J:

This is an appeal against my decision refusing the application (encl. 5) by the respondents Sentul Raya Sdn Bhd (the respondents) for an injunction to restrain the petitioners, their agents, etc., from advertising or otherwise publishing the existence or contents of the winding-up petition. The application was supported by the affidavit affirmed by Hamidah bt. Maktar on 24 August 2001 (encl. 4). I had initially directed that the application be heard *inter partes* but upon the insistence of the respondents (see para. 20 of encl. 4) encl. 5 was heard *ex parte* though somehow the petitioners' lawyer was present when the petition was heard on 30 August 2001 (presumably, notice was given to him as indicated under para. 20(b) of encl. 4).

After hearing an oral submission only from counsel for the respondents, Encik Michael Chow, I dismissed the *ex parte* interlocutory orders sought without calling on counsel on the other side, Encik Richard Tee, who indicated at the outset that he wished to have encl. 5 treated as a opposed *ex parte* application (see *Pickwick International* [1972] 3 All ER 384). Incidentally, an *ex parte* injunction may be dissolved on an *ex parte* application (see *Lim Hean Pin v. Thean Seng Co Sdn Bhd & Ors* [1991] 2 MLJ 564).

It is important to note that the Companies Act 1965 (the Act) has provided, a respondent company in a winding-up petition, ample recourse or mode of relief which would include the invocation of s. 221 of the Act, which reads:

> (1) On hearing a winding up petition the Court may dismiss it with or without costs or adjourn the hearing conditionally or unconditionally or make any interim or other order that it thinks fit, but ...
>
> (2) The Court may on the petition coming on for hearing or at any time on the application of the petitioner, the company, or any person who has given notice that he intends to appear on the hearing of the petition …
>
> (f) give such directions as to the proceedings as the Court thinks fit.

It is beyond question that the respondents did not frame their application in encl. 5 under s. 221 of the Act (of course, upon a certificate of urgency) for a stay which they could have done, and there was no explanation for this. At this juncture, I am reminded of the *dicta* of Raja Azlan Shah Ag. LP in *Land Executive Committee of Federal Territory v. Syarikat Harper Gilfillan Bhd* [1981] 1 MLJ 234 (Syarikat Harper Gilfillan Bhd), who had this to say:

> As a general rule where a statute creates a new obligation and provides a special mode of enforcing it, no other court has jurisdiction to enforce that obligation. The case generally referred to, as establishing that rule is *Pasmore v. Oswaldtwistle Urban District Council* ([1898] AC 387). We quote from the speech of the Earl of Halsbury LC:
>
> > The principle that where a specific remedy is given by a Statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the Statute, is one which is very familiar and which runs through the law. I think Lord Tenterden accurately states that principle in the case of *Doe v. Bridges* (1 B. & Ad., 847, at p. 859). He says: 'where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner.

> We now ask ourselves, what is there in the National Land Code which bars declaratory relief. Section 418 of the Code must now be looked at. If on a proper reading of it leads one to the conclusion that it is the intention of Parliament to create the right absolutely and independently of any specific form of remedy, the respondents' action is well maintained. If on the other hand the proper interpretation is that the right and the remedy are uno latu, that they are not mutually exclusive, that they are part and parcel of the remedy, then the action is misconceived. Reading section 418 of the Code, we are satisfied that the latter is the correct interpretation.

Though *Syarikat Harper Gilfillan Bhd* was referred to and adopted by me in *Shell Malaysia Trading Sdn Bhd v. Pemungut Duti Setem Pulau Pinang* [1998] 1 CLJ Supp 126, it ought to be made clear here that for the purpose of the instant matter (encl. 5) I do not propose – and neither is it necessary – to adopt the ratio in *Syarikat Harper Gilfillan Bhd.*

Generally viewed, it is interesting to note that a company that is subject to a winding-up petition is endowed with the following ample reliefs or remedies to 'throw a spanner into the works' of or to defeat a winding-up petition, namely, they may:

(i) apply to the court to exercise its equitable jurisdiction to restrain an abuse of process, which includes an application for winding-up, and an application for injunction may be applied for as soon as the s. 218 notice is received but before the filing of the petition;

(ii) apply under s. 221 for a stay or striking out of the proceedings for abuse of process;

(iii) oppose the winding-up at the hearing proper.

Indeed, even after a winding-up order has been made the subject company may also apply under s. 243 for a stay of the proceedings 'either altogether or for a limited time'.

Incidentally, a discussion on s. 221 would not be complete without also touching on s. 222 of the Act, which has engendered considerable controversy in legal circles. With respect, after having carefully studied s. 222 I must say that I am *ad idem* with the construction of the provision expressed by Abdul Aziz Mohd J in *Shing Hup Hin Construction Sdn Bhd v. General Soil Engineering Sdn Bhd* [1999] 1 CLJ 303 but not that of Rekhraj J in *Foursea Construction (M) Sdn Bhd* [1998] 3 CLJ 135 which was repeated in *Solid Kitchen Sdn Bhd v. Regal Developmen Sdn Bhd* [1998] 3 CLJ Supp 409. While entirely agreeing with the close and succinct reasoning of my learned brother Abdul Aziz Mohd J let me add two further plus factors in favour of his view that the phrase 'in the action or

proceeding' in s. 222 must be construed to mean the action or proceeding other than the winding-up petition in question, although it may be some other winding-up petition.

In my view the words 'in the action or proceeding' after the words 'to stay or restrain further proceeding' must mean 'any action' or proceeding pending against the company. Thus, the words 'to stay or restrain further proceedings in the action or proceeding' cannot upon true construction be construed to mean a stay of the particular winding-up action or proceeding in question then before the court but other action or proceeding before the same or other court. This intention of the legislature is fairly clear, though, had they added the phrase 'in which the action or proceeding is pending' – as appearing in a similar English s. 226 of the Companies Act – to interpose between the phrase 'apply to the court' and 'to stay or restrain' in our s. 222 such intention would have been made crystal clear and would have avoided the controversy.

The second further reason is that, notably, s. 223 which closely follows s. 222 proclaims a caveat against the disposition of property of the subject company sought to be wound up. Considering that s. 222 is juxtaposed with s. 223, it would be entirely logical to conclude that for practical reasons, the legislature intends to couple the caveat against such disposition of property of the particular company in question with a provision enabling the court to stay other proceedings against the same subject company in question that is sought to be wound-up.

At first blush, the contents of encl. 4 would indicate that the respondents are armed with persuasive factual grounds for this court to grant an injunction to restrain publication of the winding-up petition, upon terms that they deposit the sum of RM88,455.67 (being the sum claimed) into court – as was offered by the respondents in para. 15 of encl. 4.

I dismissed the *ex parte* application in encl. 5 solely for the reason that I was of the considered view that this court cannot injunct the petitioners from exercising their statutory right – and indeed a mandatory requirement – to advertise the petition, under r. 24 of the Companies (Winding-Up) Rules 1972 (the Rules). Rule 24 reads:

> Every petition shall be advertised in Form 4 seven clear days or such longer time as the Court may direct before the hearing, as follows:
>
> (a) once in the Gazette and twice at least in two local newspapers circulating in Malaysia or in such other newspapers as the Court may direct;
>
> (b) …

> and if the petitioner or his solicitor does not within the time hereby prescribed or within such extended time as the Registrar may allow duly advertise the petition in the manner prescribed by this rule, the appointment of the time and place at which the petition is to be heard, shall be cancelled by the Registrar and the petition shall be removed from the file unless the Judge or the Registrar shall otherwise direct.

In law, the requirement under r. 24 is triggered into operation as soon as the winding-up petition is filed. As such, bearing in mind the abiding and trite maxim "Equity follows the law", I would hold that the court is not empowered to make any order to restrain or injunct the petitioners from carrying out their statutory obligation to comply with r. 24. In this regard it would perhaps be illuminating to quote from a passage in *Snell's Equity* (13th edn) p. 29 which reads:

> The Court of Chancery never claimed to override the courts of common law. 'Where a rule, either of the common or the statute law, is direct, and governs the case with all its circumstances, or the particular point, a court of equity is as much bound by it as a court of law, and can as little justify a departure from it.'

In that case the respondent company had also applied for an injunction to restrain the appellant from advertising the petition and this was granted by the High Court.

A recourse to injunction relief by the company upon receipt of the s. 218 notice but prior to the filing of a winding-up petition is entirely appropriate. However, in my judgment, once a winding-up petition is filed, the court is precluded from granting an injunction against advertisement or gazettal of the petition. Due to the deliberate choice of the words "Every petition shall be advertised …" in r. 24 of the Companies Winding-Up Rules 1972 (the Rules) in contradistinction to the words in the dissimilar provision for advertisement in the English and Australian Rules, I would hold that our legislature had intended gazettal and advertisement to be mandatory procedures concomitant with the petition itself which debars the courts from restraining it. In England, (post- 1979) r. 4.11(1) of the Insolvency Rules 1986 (the precursor to r. 28 of the Companies (Winding-Up) Rules 1949 under which such advertisement was mandatory) provides that unless the court otherwise directs every petition is to be advertised in gazette not less than seven clear days after it has been served on the company and not less than seven clear days before the day fixed for the hearing (see Practice Direction (No. 1 of 1986); [1986] 1 WLR 286). This 'seven clear days after service on the company' rule is designed: (1) to give a company served with a winding-up petition the opportunity to discharge the debt in question, if it is undisputed, before advertisement takes place, with all the

necessarily potentially damaging consequences to the company; and (2) to enable the company, if it wishes to dispute the debt, to apply to restrain advertisement (see *Re Signland Ltd* [1982] 2 All ER 610, *Re a Company (No. 0013925 of 1991)* [1992] BCLC 562). Indeed, under these rules advertisement may be restrained until there has been hearing on merits. Thus, if there is a court order forbidding advertisement of a petition, then its non-advertisement is not in itself a ground for dismissing the petition (*Re Five Oaks Construction Ltd* [1968] 112 SJ 86) (see also *Applications to Wind Up Companies by Derek French B Sc - Blackstone Press Ltd*).

The position concerning advertisement of a petition under Australian law is also similar to that obtaining in England. Rule 8.10 of the Rules of the Supreme Court for State of Victoria provides that a notice of motion for "winding-up shall be gazetted and advertised in Form 16 not earlier than fourteen days after the notice of motion is filed and not less than fourteen days before the hearing". Clearly, r. 8.10 is designed to ensure that the respondent company has ample time to apply to the court for an injunction which will be effective to prevent advertising and gazettal. The relevant rule of Court in New South Wales (r. 18(4) of Part 80 of the rules) provides that "unless the court otherwise orders" notice of a winding-up petition application under s. 364(1) of the Companies (NSW) Code "be published once in the Government Gazette and once in a prescribed newspaper not earlier than three days after the date of service on the company of the summons claiming the order and not later than three days before the hearing". Thus, the English cases, namely, *Re a company (No. 008725 of 1991 and No. 008727 of 1991)* [1991] BCLC 633, *Re a company (No. 007923 of 1994) Re a company No. 007924 of 1994)* [1995] 1 BCLC 440, and Australian cases such as *Re DR Electrical and Engineering Pty Ltd* – 15 ACLR 700 – 6,20 September 1989 – Melbourne; *Commissioner of State Revenue of Victoria v. The Roy Morgan Research Centre Pty Ltd* 24 ACSR 73 30 May 1997 – Melbourne; and *In The Matter of the Corporations Law of Victoria and In The Matter of Brick Link Pty Ltd* 4524 of 1991 – 1991 Vic Lexis 505, BC 9100684 are of no assistance in resolving the issue before me.

Hence, clearly, in both Australian and English (after 1979) jurisdictions due to the particular wording in the proviso "unless the court otherwise directs/ orders", the requirement of publication and gazetting of the petition has never been construed by the English and Australian courts as mandatory – only directory. Whereas r. 24 of our Rules makes mandatory the publication and gazettal of the petition, as it is couched as "every petition shall be advertised (in Form 4) seven clear days or such longer time as the court may direct before hearing". Indeed, a fortiori as it is further

provided in the same rule that upon failure to duly advertise, "the petition … shall be cancelled by the registrar and the petition shall be removed from the file unless the judge or the registrar shall otherwise direct."

Thus, in so far as advertisement and gazettal are concerned English and Australian case authorities are inapplicable in our jurisdiction since advertisement and gazettal are mandatory procedures here, and are thus not amenable to injunctive reliefs. Indeed, in Australia, in the event an injunction is granted against advertisement and gazettal a typical consequential order that is made stipulates that "the applicant refrain from gazetting or advertising the winding-up application and instead notify members and creditors of the company that the application has been made and of their right to support or oppose it" (as in the *Roy Morgan* case *(supra)*). And, in England such injunction may be made, subject to certain alternative notification procedure being carried out by the petitioner, in which event a winding-up order may be made without advertisement or gazettal. Whereas, in Malaysia there has never been a case where a winding-up order has been made without advertisement or gazettal.

Historically, the nearest that our courts first came to considering the question of an exemption of advertisement was way back in 1985 in the case of *Re NKM Holdings Sdn Bhd* [1985] 2 MLJ 390. In that case learned counsel Mr. W.S.W. Davidson, in anticipation of the court arriving at a finding of fact that the petition had not been duly advertised in the Government gazette, asked the court to invoke s. 221(2)(b) of the Companies Act and make orders dispensing the need to advertise (that is, the first advertisement) the petition. This resulted in the learned judge expressing the following views:

> I agree with Mr. Davidson that the need to gazette has indeed deteriorated into a mere formality and in the face of the existence of widely circulated daily newspapers has perhaps become an anachronism.

While confirming the exercise of the learned judge's discretion to dispense with advertisement in the gazette and newspapers of the new date for hearing of the petition, Seah SCJ who delivered the judgment of the Supreme Court in the appeal against the judgment of the High Court struck down the tentative though implied suggestion of George J (see *NKM Holdings Sdn Bhd v. Pan Malaysia Wood Bhd* [1987] 1 MLJ 39) with unusually strong language. This was how the mandatory nature of r. 24(1) of the Rules was expressed by the learned Supreme Court judge:

> With respect to the learned judge, we are unable to agree with his view. Advertisement of a winding-up petition in the Gazette is a statutory requirement (see r. 24(a) of the Companies (Winding-up) Rule 1972) and deliberate non-compliance with this provision may result in adverse consequences. It must always be borne in mind that we are Judges, not legislators. The constitutional function of the courts is not only to interpret but also to enforce the laws enacted by Parliament. In enforcing the law we must be the first to obey it. It should be noted that the power of a Court to proceed in a particular course of administering justice, was one of substance and not merely of form. The duty of the Court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. The Court has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. It seems to us to be unwise as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a covert censure on the Legislature.

Then, about three years hence, the Supreme Court, in *Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd* [1988] 2 CLJ 424; [1988] 1 CLJ (Rep) 5, had occasion to rule that advertisement, under our jurisdiction, is a mandatory requirement with the following *dicta*:

> … the Companies (Winding Up) Rules 1972 require that every petition should be advertised and it is immaterial whether the effect of such advertisement in a particular case would result in damage being caused to the company proposed for winding up. Even if the advertisement would in fact cause such damage, this is not a ground to prevent a bona fide petitioner from advertising.

It is noteworthy that certain other provisions of the Rules have already been construed to be mandatory in nature by our courts. The Court of Appeal in *Crocuses & Daffodils (M) Sdn Bhd v. Development & Commercial Bank Berhad* [1997] 3 CLJ 485 had unequivocally held r. 30(1) of the Rules – which required affidavits supporting the company's notice of intention to oppose the petition to be filed and a copy thereof served on the petitioner or his solicitors at least seven days before the hearing of the petition – to be a mandatory provision requiring strict compliance. Similarly, s. 226(3) of the Companies Act has also been construed by the Court of Appeal in *CGU Insurance Berhad v. Asean Security Paper Mills Sdn Bhd* [2001] 1 CLJ 305 to be a mandatory provision. Although this decision of the Court of Appeal was reversed by the Federal Court, in *CGU Insurance Berhad v. Asean Security Paper Mills Sdn Bhd, And Two Other Appeals* [2002] 2 CLJ 1, yet the ratio of the Court of Appeal that s. 226(2) is a mandatory provision was not disturbed.

In the event, I held that r. 24 of the Rules imposes upon the petitioner a mandatory rather than directory requirement to advertise and gazette the petition upon the filing of same, which debars this court from granting the injunction sought, and I dismissed the *ex parte* application in encl. 5.

In my considered opinion, as s. 218 of the Act has prescribed a substantial period of 21 days grace period to enable the company to apply for an injunction against the filing of a winding-up petition, the intention of our legislature is that once a petition is filed the question of solvency of a company is to be determined at the ultimate hearing of the winding-up application, and the fact that there is a matter of dispute ought not to give rise to a ground for the premature striking out or stay of a petition in limine. Further, in any event it is trite that equity is averse to assisting a party who sleeps on his rights.

Promptly after my decision the respondent lodged an appeal to the Court of Appeal (*vide* Mahkamah Rayuan Sivil No. W-03-29-01) and applied for an injunction to restrain advertisement and gazettal of the petition. This was granted (to restrain advertisement and gazettal) for the period until the next date fixed for hearing of the petition before me. And, as under our Act and Rules no winding-up order could be made unless r. 24 (the advertisement and gazettal requirement) is complied with, the petition had to be adjourned to another date and thus remained in permanent suspension as the result of the said injunction. This, it was envisaged, will result in the respondent making yet another application to the Court of Appeal for extension of the injunction for the period until the next fresh date for the hearing of the petition, which, in turn would, for the same reasons aforesaid be further adjourned again to a fresh date and so forth, *ad infinitum*. Due to the completely checkmated position that the court below (my court) and the court above was placed, I took it upon myself to call counsel for both parties to chambers to explain the situation. Fortunately, good sense prevailed – petitioner withdrew its petition, and the respondent, its appeal to the Court of Appeal.